BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONNA LYNN FAUCHEUX	)	
Claimant	)	
	)	
VS.	)	
	)	
MID-AMERICA RHEUMATOLOGY CONSULTANTS	)	
Respondent	)	Docket No. 1,035,887
	)	
AND	)	
	)	
AMERICAN ECONOMY INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 24, 2008, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts. James R. Shetlar, of Overland Park, Kansas, appeared for claimant. Clifford K. Stubbs, of Roeland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's current need for medical treatment is a result of her original work-related injury. The ALJ acknowledged that claimant suffered an intervening injury which was treated and which has resolved.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 20, 2008, Preliminary Hearing and the exhibits, including the transcript of the discovery deposition of claimant taken October 23, 2007, which was entered as an exhibit at the preliminary hearing; the transcript of the April 15, 2008, evidentiary deposition of Julie Durigan and the exhibit; the transcript of the November 18, 2008, evidentiary deposition of Christine Cheng, M.D., and the exhibits; and the transcript of the April 15, 2008, evidentiary deposition of Nancy Becker, M.D., and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant failed to sustain her burden of proof that she suffered a compensable injury that arose out of and in the course of her employment. Respondent further contends that claimant's current condition and need for treatment is not related to an injury at work but, instead, was the result of an intervening injury claimant suffered while she was on vacation, for which she had undergone surgery.

Claimant argues that medical causation can be determined by the trier of fact and, accordingly, requests that the ALJ's Preliminary Decision be affirmed.

The issue for the Board's review is: Is claimant's current need for medical treatment the result of an injury that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant began working for respondent in May 2002 as an infusion therapy supervisor. In that capacity, she started IV's; prepared and administered medication; monitored drug reactions; and dealt with the problems of doctors, nurses and patients. She also ordered medications, kept daily inventory, and completed monthly reports. She began noticing problems with her right hand and arm about two years after starting work for respondent, first when using a plunger and syringe. Later, starting IV's and tying tourniquets became a problem. Claimant testified she would pull a plunger out of a 30 milliliter syringe using her thumb and then push the plunger to push the medication out of the syringe between 200 and 300 times a day, causing her right hand to swell and the bone to come out of the joint. Dr. Nancy Becker, a co-owner of respondent, testified that as a supervisor, claimant would occasionally perform infusions and mix medication, but a lesser amount than the other infusion nurses and assistants. Julie Durigan, a coworker of claimant, testified that in 2006, she observed claimant have difficulty using a syringe.

Claimant's condition gradually got worse, and she had more pain when using the plunger, drawing blood, starting IV's, and tying tourniquets. She testified that by January 2007, instead of using her thumb to push the plunger to get the medicine out of the syringe, she would push the plunger with the heel of her hand. She also used this technique when starting an IV on a patient. Ms. Durigan confirmed that she saw claimant use the heel of her hand in that way. Claimant testified that she also would have other employees assist her in doing those tasks that were painful to her.

Claimant reported her problems to her supervisor, Debbie Liggatt, and to Dr. Becker, who was not only claimant's employer but also her physician. On July 5, 2005, claimant received the first of three cortisone injections into her right thumb performed by Dr. Becker. In the summer of 2006, Dr. Becker prescribed some pain medication. On October 2, 2006, claimant asked Dr. Becker if she thought it would help to have another

injection and was told there was too much damage to the joint and an injection would probably do more harm than good. Dr. Becker testified that there is no mention of subluxation of the right thumb in her office notes of October 2, 2006. The first time Dr. Becker knew that claimant had subluxation in her right thumb was in April 2007.

On January 29, 2007, claimant went to see Dr. Keith Hodge, a plastic surgeon. She claimed this was at the suggestion of Dr. Becker. Dr. Hodge's record of that date mentions that claimant has very lax joints at the MP and further said: "This is bordering a gamekeeper's thumb especially on the right."[1] Dr. Hodge ordered an x-ray, which showed minor arthritic changes. He recommended conservative therapy and a splint to help with the pain. Claimant testified he told her she would probably need a joint fusion or joint replacement. However, he told her he had not performed many thumb joint fusions, and she did not return for a follow up.

On March 28, 2007, while claimant was on vacation, she was removing a sticker from her luggage when she felt a pop in her thumb. She testified the pop she felt that day was the same sensation she had previously felt when drawing medications or performing other tasks using her thumb. On April 2, 2007, she saw Mathew Svoboda, a physician's assistant with respondent, for a Boniva injection she regularly received for osteoporosis. Mr. Svoboda's note of that day indicated that she had significant pain and swelling in her right hand since the luggage incident. Mr. Svoboda's note goes on to indicate that claimant had received multiple cortisone injections with less and less efficacy each time. Claimant testified that she had pain and swelling in her right hand long before the luggage incident, and that was the reason she had been getting cortisone injections. Dr. Becker testified that before the luggage incident, claimant suffered from arthralgias, and after the incident with the luggage, claimant had a "quantum leap" change in pain.[2] For that reason, Dr. Becker recommended that claimant seek further medical evaluation.

On April 5, 2007, at the recommendation of Dr. Becker, claimant went to see an orthopedist, Dr. Brian Divelbiss. Claimant testified she told Dr. Divelbiss that she had problems in her hand for a long time. She could not explain why his notes reference a one-week history of right thumb pain, other than she had recently experienced the popping incident with the luggage. She was referred to physical therapy and was placed in a hard splint to see if the bone would go back into the joint.

Claimant said her problem got worse and her hand started turning purple. She then went to see Dr. Lynn Ketchum, whose office was next door to respondent, on April 30, 2007, complaining of right thumb pain and decreased function. Dr. Becker approved of claimant going to see Dr. Ketchum. On the patient information history claimant filled out,

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[1] P.H. Trans., Cl. Ex. 2.

[2] Becker Depo. at 51.

she indicated she had osteoarthritis in the right thumb and had felt a pop sensation on March 28, 2007, with resulting pain. Dr. Ketchum performed surgery on claimant's hand on May 23, 2007. Claimant returned to work on approximately May 29, 2007, with her hand in a cast. This surgery was not a joint fusion or joint replacement, as had previously been suggested by Dr. Hodge, but was to correct subluxation of the MP joint of the right thumb. In a letter to claimant's attorney dated December 18, 2007, Dr. Ketchum stated that although claimant was still recovering from surgery on her thumb, he rated her impairment as being 15 percent of the right upper extremity.

Claimant continues to have problems with her thumb. She is now being seen by Dr. Christine Cheng, who has diagnosed her with MP joint volar subluxation and osteoarthritis. When claimant first saw Dr. Cheng on August 5, 2008, she gave a history of right thumb pain with progressive pain and discomfort that had been limiting her activities for three years. She reported no specific accident or injury. Dr. Cheng has recommended conservative treatment such as a splint, steroid injections, and physical therapy. In fact, she did inject the joint and sent claimant for physical therapy and a splint. As a last resort, she would recommend surgery to fuse the joint. She testified that her recommendations for treatment are similar to those set out by Dr. Hodge in January 2007, before claimant's incident involving the luggage. Dr. Cheng did not examine claimant's left hand or left thumb.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2008 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

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[5] *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

In *Logsdon*,[9] the Kansas Court of Appeals stated:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
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> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[10] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[11]

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[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[8] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[9] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[10] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[11] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

Claimant has alleged her right thumb injury was caused by performing her regular nursing duties with respondent by a "[s]eries of traumas thru May 23, 2007, and every day after May 29, 2007."[14] Claimant worked for respondent as a supervisor in the infusion department from 2002 until August 9, 2007, when she was terminated.

By history from the patient, Dr. Ketchum related claimant's subluxation and surgery to the incident on March 28, 2007, in Florida when claimant was pulling a sticker off of luggage and felt a pop in her right thumb MP joint. Dr. Ketchum's letter to Dr. Becker dated May 30, 2007, refers to treatment for "chronic subluxation of the MP joint of her right thumb as the result of attenuation of the extensor pollicis brevis and capsule of the MP joint along with treatment of the exostosis of the right first metacarpal."[15] Dr. Becker said claimant's symptoms and pain complaints in April 2007, upon her return from her trip to Florida, were markedly greater than what claimant had described previously. In addition, Mr. Svoboda's examination on April 2, 2007, was the first time she had subluxation of the MP joint. That is why Dr. Becker recommended claimant see a hand specialist. Dr. Becker described claimant as having had a new injury and new findings on x-ray. However, when Dr. Hodge examined claimant on January 29, 2007, which was before the incident in Florida, he diagnosed claimant with very lax joints bordering on gamekeepers thumb. Claimant gave Dr. Hodge a history of right thumb pain for approximately two years. Dr. Divelbiss was given a history on April 5, 2007, of a one week history of right thumb pain. Dr. Cheng did not have an opinion as to the cause of claimant's right thumb condition.

No physician specifically opines that claimant's subluxation of her right thumb MP joint preexisted her incident with the suitcase in March 2007, although Dr. Hodge's notes are suggestive of that. It is not entirely clear what claimant's position is. Claimant is either arguing that the surgery performed by Dr. Ketchum addressed the injury of March 2007 and claimant is now seeking treatment for the work-related condition that preexisted that

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[12] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2008 Supp. 44-555c(k).

[14] Form K-WC E-1, Application for Hearing, filed August 1, 2007.

[15] P.H. Trans., Resp. Ex. A at 20.

incident, or else is arguing that the March 2007 incident was a temporary aggravation of the preexisting work-related problem or a natural consequence of that problem.

The medical evidence is not persuasive of any of these scenarios. There is absent from this record a medical opinion that claimant's current need for treatment is the result of her work and not the incident of March 2007. It could be that in this case, absent the preexisting condition, claimant's March 28, 2007, injury would not have occurred. However, this record does not contain such a "but for" opinion from a medical expert such as in *Logsdon*.

In *Logsdon*, the Court of Appeals held that a non-work related shoulder injury was compensable as a natural and probable consequence of the work-related injury that had occurred over 10 years earlier based upon a medical expert's opinion that:

> "[T]his is a but-for situation in which if [Logsdon] would not have had an injury in '93 . . . he would not have had the injury which he sustained from a relatively trivial–although it wasn't in the ordinary course of events–but a trivial slip and fall, threw his arms up, that in and of itself wouldn't have caused an injury in a normal person."[16]

No physician having all of the medical records and with a complete history of claimant's prior medical treatment, tests, symptoms and aggravating incidents has rendered an opinion either as to whether the incident of March 28, 2007, was a new injury or whether, instead, that incident was a trivial trauma that in and of itself would not have caused injury in a normal person. Absent such an opinion, the record is deficient as to whether claimant's current need for treatment is for a work-related condition. Given the inconsistencies in the record concerning the significance of the March 28, 2007, incident and the severity of claimant's prior symptoms, a determination of the ultimate issue presented here calls for speculation.

Based on this record, claimant has not satisfied her burden of proof that her current need for treatment is due to her work-related injury.

CONCLUSION

Claimant has failed to prove that her current need for medical treatment is the result of an injury or series of accidents and injuries that arose out of and in the course of her employment with respondent.

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[16] *Logsdon*, 35 Kan. App. 2d at 81.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated November 24, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of February, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge